

1 IN THE UNITED STATES BANKRUPTCY COURT FOR
2 THE DISTRICT OF PUERTO RICO

3 IN RE:

4 HERMANOS TORRES PEREZ INC

5 XXX-XX9491

6 Debtor(s)

CASE NO. 09-05585 MCF

Chapter 11

7 FILED & ENTERED ON 06/02/2010

8 ORDER AND OPINION

9 BACKGROUND

10 The debtor in the instant case filed a voluntary petition for relief under
11 Chapter 11 of the Bankruptcy Code on July 7, 2009 (Docket No. 1). On November 2,
12 2009, debtor filed a first request for extension of the exclusivity period, where
13 it requested an extension of thirty (30) days to file a Disclosure Statement and
14 a Plan of Reorganization, and a period of sixty (60) days after the entry of an
15 Order approving the Disclosure Statement to solicit approval and secure
16 acceptance of a Plan of Reorganization (Docket No. 47).

17 On November 20, 2009, debtor filed a second motion requesting extension of
18 the exclusivity period. This time, debtor requested until January 10, 2010, to
19 file the Disclosure Statement and Plan of Reorganization, and, likewise, an
20 extension of sixty (60) days following the entry of an Order approving the
21 Disclosure Statement to secure acceptance of a Plan of Reorganization (Docket No.
22 53).

23 The Court issued an Order on December 4, 2009, granting debtor's request
24 for extension of the exclusivity period to file a chapter 11 plan until January
25

1 10, 2010 (Docket No. 63). Debtor filed its Disclosure Statement and Chapter 11
2 Plan of Reorganization on January 11, 2010. (Docket No. 79 and 80).¹

3 Peerless Oil & Chemicals, Inc. ("Peerless"), a creditor and party in
4 interest in the present bankruptcy proceedings, filed a motion for leave to file
5 a competing Chapter 11 plan on April 22, 2010 (Docket No. 133). Debtor opposed
6 Peerless' request on April 29, 2010, on the basis that debtor is still within its
7 extended exclusivity period; thus Peerless is impeded from proposing a competing
8 plan at this time (Docket No. 139). Debtor's position is premised on the
9 argument that the sixty (60) day exclusivity period for debtor to solicit votes
10 and obtain the acceptance of the Chapter 11 plan was automatically extended by
11 the Court's December 4, 2009 Order.

12 Peerless filed a reply to debtor's opposition on May 10, 2010 (Docket No.
13 144).

14 DISCUSSION

15 Before initiating our review, we must first recognize and take into account
16 how the law of the case of the instant proceedings correlates with the issue at
17 hand.
18

19 The "law of the case" doctrine "makes binding upon a court a ruling made
20 [in] the same . . . level [of court] during prior stages of the same litigation."
21 Lacy v. Gardino, 791 F.2d 980, 984 (1st Cir. 1986); Whitehouse v. Laroche, 277
22 F.3d 568, 573 (1st Cir. 2002). "The law of the case doctrine is a prudential
23 principle that 'precludes relitigation of the legal issues presented in
24 successive stages of a single case once those issues have been decided.'" Field
25 v. Mans, 157 F.3d 35, 40 (1st Cir. 1998)(quoting Cohen v. Brown Univ., 101 F.3d
155, 167 (1st Cir. 1996)). Once an order is final, and the same has not been
appealed, it becomes the law of the case. First Am. Title Ins. Co. v. Pifalo (In
re Pifalo), 379 B.R. 1, 4 (B.A.P. 1st Cir. 2007).

¹ Given that January 10, 2010 fell on a Sunday, and in accordance with Fed. R. Bank. P. 9006(a), debtor timely filed its extended Chapter 11 Plan of Reorganization on January 11, 2010 (Docket No. 79 and 80).

1 In the case at bar, debtor filed a first request for extension of both the
2 filing and acceptance exclusivity periods on November 2, 2009, that is, one
3 hundred and eighteen (118) days after the order of relief (Docket No. 47).
4 Before the Court had an opportunity to rule upon debtor's request, and during the
5 extended term proposed by debtor, on November 20, 2009, debtor filed a second
6 motion requesting, again, the extension of both the filing and acceptance
7 exclusivity periods (Docket No. 53).

8 This Court issued an Order on December 4, 2009, which determined that
9 "[d]ebtor(s)' request for extension of the exclusivity period for filing a
10 chapter 11 plan...is hereby granted, until January 10, 2010." (Docket No. 63)
11 (emphasis added). Debtor did not request reconsideration, nor appealed, the
12 Court's December 4, 2009 mandate.

13 Given the above-delineated background, there is no question that the
14 Court's December 4, 2009 ruling to extend the exclusivity period to file a
15 Chapter 11 plan became the law of the case. Therefore, it is undisputed that the
16 Court only conceded the extension of the exclusivity period to file the Chapter
17 11 plan, and not the exclusivity period to accept the plan.

18 Notwithstanding the above, debtor argues at its opposition to Peerless'
19 request for leave to file a competing plan that the Court's order extending the
20 exclusivity period to file the Chapter 11 plan had, as a matter of law, the
21 immediate and automatic effect of extending the exclusivity period to accept the
22 Chapter 11 plan (Docket No. 139). Debtor's argument is a novel one and a matter
23 of first impression before this Court.

24 As such, the main controversy before this Court becomes the following: was
25 debtor's exclusivity period to accept the plan automatically extended by virtue
of the Court's extension of debtor's exclusivity period to file a Chapter 11
plan?

1 In order to consider this issue, we must first analyze how the exclusivity
2 period, and its extensions thereof, operate under the Bankruptcy Code. We begin
3 our review by considering the contents of section 1121.

4 Section 1121 states at its pertinent parts:

5 (a) The debtor may file a plan with a petition commencing a
6 voluntary case, or at any time in a voluntary case or an involuntary
case.

7 (b) Except as otherwise provided in this section, only the debtor
8 may file a plan until after 120 days after the date of the order for
relief under this chapter.

9 (c) Any party in interest, including the debtor, the trustee, a
10 creditors' committee, an equity security holders' committee, a
11 creditor, an equity security holder, or any indenture trustee, may
file a plan if and only if--

12 (1) a trustee has been appointed under this chapter;

13 (2) the debtor has not filed a plan before 120 days after the
date of the order for relief under this chapter; or

14 (3) the debtor has not filed a plan that has been accepted,
before 180 days after the date of the order for relief under this
chapter, by each class of claims or interests that is impaired under
the plan.

15
16 11 U.S.C. § 1121(a)-(c).

17 Sections 1121(b) and (c) of the Bankruptcy Code contains what is commonly
18 referred to as the "exclusivity period" provisions in a Chapter 11 context.
19 These sections codify those periods of time in which the debtor, and only the
20 debtor, may file a Chapter 11 plan and/or solicit acceptance of the Chapter 11
21 plan. Creditors and other parties in interest are barred from filing a competing
22 plan during this time.

23 Section 1121(c) separates the exclusivity periods in two separate
24 categories. The first is a 120-day period to file a Chapter 11 plan (the "filing
25 period"), and the second is a 180-day period for accepting the Chapter 11 plan
(the "acceptance period"). Both of these periods commence after the order for
relief has been entered and they both run concurrently. In re Gibson & Cushman
Dredging Corp., 101 B.R 405, 407 (E.D.N.Y. 1989). From a practical standpoint,
both of these exclusivity periods operate in the following fashion: debtor is
allotted 120 days after the order of relief to file a Chapter 11 plan, and,

1 subsequently, debtor shall have an additional 60 days to get said plan confirmed
2 (120 + 60 = 180 days).

3 Section 1121(c) lists the three instances in which debtor's exclusivity
4 period will conclude. These instances are: (1) the appointment of a Chapter 11
5 trustee, (2) should debtor not file a Chapter 11 plan within the 120 day filing
6 period, or (3) should debtor not be able to accept a timely filed Chapter 11 plan
7 within the 180 day acceptance period.

8 The three events listed at section 1121(c) are in the disjunctive.
9 Therefore, "[o]nce one of these instances occurs, the debtor's exclusive right to
10 file a plan ends, and competing plans are fai[r] game." In re Grant Family
11 Farms, Inc., 2007 Bankr. LEXIS 2779 (Bankr. D.Co. 2007).

12 Section 1121(d) provides debtor the opportunity to move the Court for an
13 extension of the exclusivity periods to file and/or to accept a Chapter 11 plan.

14 This section provides:

15
16 (d) (1) Subject to paragraph (2), on request of a party in interest
17 made within the respective periods specified in subsections (b) and
18 (c) of this section and after notice and a hearing, the court may
19 for cause reduce or increase the 120-day period for the 180-day
20 period referred to in this section.

21 (2) (A) The 120-day period specified in paragraph (1) may not be
22 extended beyond a date that is 18 months after the date of the order
23 for relief under this chapter.

24 (B) The 180-day period specified in paragraph (1) may not be
25 extended beyond a date that is 20 months after the date of the order
for relief under this chapter.

(2) the time the case is closed or dismissed.

11 U.S.C. § 1121(d).

23 Pursuant to section 1121(d), a debtor may extend the 120-day filing period,
24 as well as may extend the 180-day acceptance period, should debtor meet the
25 following requirements:

1. The request must be timely:

a. For an extension of the filing period, the same must be made
within 120 days after the order of relief;

b. For an extension of the acceptance period, the same must be
made within 180 days after the order of relief;

1 2. The requested extension may not be:

2 a. Greater than 18 months after the order of relief for
3 extensions of the filing exclusivity period;

4 b. Greater than 20 months after the order of relief for
5 extensions of the acceptance exclusivity period

6 3. Debtor must show the existence of cause for the extension; and

7 4. Notice and hearing must be afforded to all parties in interest.

8 Even though section 1121 lists the filing period as being separate and
9 distinct from the acceptance period, some courts have applied the extension
10 provisions of section 1121(d) in very different ways. In this regard, "[t]here
11 is disagreement among the bankruptcy courts on the question of whether the
12 exclusive period for obtaining acceptances is automatically extended whenever the
13 exclusive period for filing a plan is extended." 7-1121 Collier on Bankruptcy P
14 1121.04.

15 The cases of *In re Barker Estates, Inc.*, 14 B.R. 683 (Bankr. W.D.N.Y. 1981)
16 and *In re Trainer's, Inc.*, 17 B.R. 246 (Bankr. E.D. Pa. 1982) have found that the
17 filing period and the acceptance period are mutually exclusive, and that the
18 extension of the filing period does not automatically extend the 180 day
19 acceptance period. On the other hand, cases such as *In re Ravenna Industries,*
20 *Inc.*, 20 B.R. 886 (Bankr. N.D. Ohio 1982) and *In re Judd*, 173 B.R. 941 (Bankr. D.
21 Kan. 1994) have held that "where a debtor asks for an extension of the 120-day
22 period and an extension is granted without objection by any party in interest,
23 then the extension automatically operates to extend the 180-day period as well."
24 *Ravenna Industries*, 20 B.R. at 891.

25 The case of *In re United Press International, Inc.*, 60 B.R. 265 (Bankr.
D.C. 1986), however, presents an interesting approach with regards to the
extension of the exclusivity periods:

Sections 1121(c)(2) and (c)(3) relate to two different acts, within
two consecutive time periods. But unless and until the first act
takes place, the second act -- and its time period -- simply do not
yet come into play. Logically, a plan cannot be accepted until it

1 has been filed; hence, § 1121(c)(3) does not become operative until
2 a plan has been filed. Therefore, however many times and for
3 whatever periods extensions are granted for the carrying out of the
4 first act, the time limit for carrying out the second act has no
5 applicability until the first act -- the filing of the debtor's plan
6 -- has actually taken place. At that point, the time period for
7 accomplishing the second act becomes relevant again, and at or
8 before that point the debtor must request an extension for
9 completion of the second act -- obtaining acceptances of the plan
10 that has been filed.

11 Id. at 269 (emphasis added).

12 Given the lack of uniformity among the bankruptcy courts as to the
13 extension provisions of section 1121(d), and in order for this Court to properly
14 evaluate debtor's position on whether the acceptance period should be
15 automatically extended when the filing exclusivity period has been extended, we
16 must turn to the intent and history surrounding section 1121 of the Bankruptcy
17 Code.

18 Prior to the enactment of section 1121 as part of the Bankruptcy Reform Act
19 of 1978, the debtor enjoyed the sole right to propose a plan of reorganization
20 throughout the bankruptcy proceedings of a chapter XI case (which later became
21 the Chapter 11 of our current Bankruptcy Code). Gibson, 101 B.R. at 409. This
22 exclusive right gave debtors an "undue bargaining leverage, because by delay he
23 can force a settlement out of otherwise unwilling creditors...The debtor is in
24 full control, often to the unfair disadvantage of creditors." Report of the
25 Committee on the Judiciary, House of Representatives, to accompany H.R.8200, H.R.
Rep. No. 95-595, 95th Cong., 1st Sess., pp. 231-232 (1977); In re Public Serv.
Co. of New Hampshire, 88 B.R. 521, 534-535 (Bankr. D.N.H. 1988).

Section 1121, including its provisions for debtor's exclusivity period and
its extensions thereafter, was enacted by Congress as a means to balance debtor's
exclusive right to propose a plan while recognizing the stake of the creditors in
debtor's business.

Proposed chapter 11 recognizes the need for the debtor to remain in
control to some degree, or else debtors will avoid the
reorganization provisions in the bill until it would be too late for
them to be an effective remedy. At the same time, the bill
recognizes the legitimate interests of creditors, whose money is in

1 the enterprise as much as the debtor's, to have a say in the future
2 of the company.

3 Report of the Committee on the Judiciary, House of Representatives, pp. 231-232;
4 Public Serv. Co., 88 B.R. at 534-535.

5 "The goal reflected in 11 U.S.C. § 1121, in allowing other interested
6 parties to file a plan of reorganization after the expiration of the debtor's
7 exclusivity period, was predicated on the theory that there should be a relative
8 balance of negotiating strength between debtors and creditors during the
9 reorganization process." In re Texaco, Inc., 76 B.R. 322, 325 (Bankr. S.D.N.Y.
10 1987). By way of section 1121, Congress intentionally created an ongoing tension
11 between the debtor and its creditors "which will hopefully lead to [an]
12 appropriate administration of and a successful conclusion to the Chapter 11
13 case." In re Tony Downs Foods Co., 34 B.R. 405, 407 (Bankr. Minn. 1983).

14 It is uncontested that debtor requested on two separate occasions for the
15 extension of both the filing and acceptance exclusivity periods. Despite
16 debtor's requests, the Court solely, and exclusively, conceded the extension of
17 the 120-day filing exclusivity period at its December 4, 2009 ruling. Based on
18 this, and as above discussed, the law of the case in the instant proceedings is
19 clear, whereby debtor's 120-day filing period, and only debtor's 120-day filing
20 period, was extended until January 11, 2010.

21 In view of the facts herein discussed, and in consideration of the legal
22 analysis above-exposed, the Court is persuaded to apply the standard adopted in
23 the cases of In re Barker Estates, Inc., 14 B.R. 683, and In re Trainer's, Inc.,
24 17 B.R. 246, with regards to the issue on whether the exclusivity period to
25 accept a Chapter 11 plan should be automatically extended whenever the filing
exclusivity period has been extended under section 1121(d).

As such, it is the Court's position that the filing exclusivity period and
the acceptance exclusivity period are, indeed, mutually exclusive between each
other. This is made apparent by the clear language of sections 1121(c) and
1121(d) (which separates the filing period from the acceptance period to the

1 extent that the Bankruptcy Code gives each one a different deadline) as well as
2 by debtor's own actions where, on two different and distinct motions, it
3 separated the request for extension of the exclusivity period to file a Chapter
4 11 plan from the request for extension of the exclusivity period to solicit votes
5 and accept the plan (Dockets No. 47 and 53).

6 It is this Court's position that the extension of the 120-day filing period
7 does not automatically extend the 180-day acceptance period. We believe that
8 this interpretation is more in tune with Congress' intent of promoting a healthy
9 tension between the debtor-in-possession and the creditors during the Chapter 11
10 bankruptcy administration. Furthermore, this application coincides with the
11 Court's December 4, 2009 decision. In this regard, "it has been held that courts
12 considering extensions of the exclusivity period must 'avoid reinstituting the
13 imbalance between the debtors and its creditors that characterized proceedings'
14 under prior law." Gibson, 101 B.R. at 409 (quoting *In re Timbers of Inwood*
15 *Forest Associates, Ltd.*, 808 F.2d 363, 372 (5th Cir. 1987), *aff'd en banc*, 484
16 *U.S.* 365, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988)).

17 Debtor's original exclusivity period to file a Chapter 11 plan in the
18 instant case was due on November 4, 2009, and the original exclusivity period to
19 accept the Chapter 11 plan was due on January 4, 2010. By virtue of this Court's
20 December 4, 2009 Order, the exclusivity period to file the Chapter 11 plan was
21 extended until January 11, 2010. However, the exclusivity period deadline to
22 obtain acceptances for the plan remained the same, that is, until January 4,
23 2010. According to the case record, debtor did not request any additional time
24 to extend either the filing and/or acceptance exclusivity periods.
25

 Based on the law of the case, both the filing exclusivity period and the
acceptance exclusivity period elapsed on January 11 and January 4, 2010,
respectively. Therefore, any creditor or party in interest would have been able
to file a competing plan since January 12, 2010.

1 Debtor has been operating under the presumption that its request for
2 extension of the 180-day acceptance period was tacitly and/or automatically
3 approved by this Court at the December 4, 2009 Order. As such, according to
4 debtor's calculations, the extended acceptance period would have been for a
5 period of sixty (60) days following the entry of an Order approving the
6 Disclosure Statement (Docket No. 53). Given that the Disclosure Statement was
7 not approved until April 20, 2010, debtor was under the impression that the
8 extended exclusivity period for accepting the Chapter 11 plan (had it been
9 approved by the Court) would have concluded on June 21, 2010.

10 Pursuant to the facts at bar, and the memorandum herein portrayed, we can
11 observe that the filing period concluded on January 11, 2010, and that the
12 acceptance period concluded on January 4, 2010. Wherefore, debtor is not
13 currently enjoined by any exclusivity provisions with which to bar any party in
14 interest from filing a competing plan at this time.²

15
16 ORDER

17 WHEREFORE IT IS ORDERED that Peerless' motion for leave to file a competing
18 plan (Docket No. 133) shall be, and hereby is, GRANTED.

19 SO ORDERED.

20 Ponce, Puerto Rico, this 2nd day of June, 2010.

21
22 

23 MILDRED CABAN FLORES
24 U.S. Bankruptcy Judge

25 c: DEBTOR
CARMEN D CONDE TORRES

² Before concluding with this matter, the Court finds it necessary to address an ancillary issue raised by debtor at its objection to Peerless' motion for leave to file a competing plan. The issue in question revolves around debtor's argument that "Peerless is now trying to promote a competing plan to its own benefit, since the confirmation of the same would obviously have the effect of dismissing the [\$15 million Complaint that has been] filed by the Debtor [against Peerless]". Docket No. 139 at p. 4.

The foregoing issue is not ripe for determination, thus the Court will not delve at this time into debtor's speculation on whether Peerless will contemplate, as part of the provisions of its competing plan, the dismissal of the Adversary Proceeding filed by debtor against Peerless.